No. 12,503

IN THE

United States Court of Appeals

For the Ninth Circuit

LAURENCE STARNS,

Appellant,

vs.

VERN HUMPHRIES and MARVIN CAMPBELL,

Appellees.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court is based upon 48 USCA 101:

> "Sec. 101. District court; judges; divisions. There is established a district court for the District of Alaska, with the jurisdiction of district courts of the United States and with general jurisdiction in civil, criminal, equity, and admiralty causes;"

Jurisdiction of the Court of Appeals for the Ninth Circuit is based upon 28 USCA 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska."

and upon 28 USCA 1294:

> "Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:
> * * * * * * *
> (2) From the District Court for the Territory of Alaska or any division thereof, to the Court of Appeals for the Ninth Circuit."

STATEMENT OF THE CASE.

The defendants Blackard and Starns obtained an assignment of a lease of real property in Anchorage, Alaska. They held the lease "as tenants in common, and not as joint tenants" (page 463, Plaintiffs' Exhibit 18). Starns built a retail package liquor store on one corner of the premises and Blackard installed a bar and restaurant on the remainder of the premises. The two enterprises were separate, both physically and financially ("no person or persons other than the licensee shall have any direct or indirect financial interest in the business for which the license is issued", 35-4-16D, ACLA 1949; "provided, however, that the premises for which such license is issued shall not be connected by doors or otherwise with premises covered by any other license issued under these regulations", 35-4-21A, ACLA 1949).

Starns had lent Blackard ten thousand dollars and had a chattel mortgage on Blackard's restaurant and bar equipment, but they were not partners at any time (TR. 748, 749, 814). Blackard granted the restaurant concession to the plaintiffs by an agreement

which gave him a right of termination upon twenty-four hours notice (Plaintiffs' Exhibits 1, 2 and 3). On April 15, 1948, he had the U. S. Marshal's Office serve such a notice (Defendants' Exhibit A, TR. 160).

Three weeks later, plaintiffs filed their amended complaint (referred to herein as the "complaint") charging the defendants had interfered with their rights of occupancy and with their business in these respects:

(a) On April 20, 1948 they took possession of plaintiffs' storeroom;

(b) They neglected to provide light, heat and water in accordance with the agreement;

(c) They maliciously, wilfully and unlawfully conducted gambling games detrimental to plaintiffs' business;

(d) They wilfully and maliciously injured plaintiffs' credit rating;

(e) On May 5, 1948, they maliciously prohibited the delivery of fuel oil;

(f) On May 5, 1948, they took possession of the restaurant and locked the premises, announcing to plaintiffs' customers that the premises were permanently closed.

The complaint asked for an injunction, for compensatory damages, and for punitive damages.

Issue was joined by a general denial, a permissible pleading under the then prevalent practice. The Federal Rules of Civil Procedure became effective in

Alaska on July 18, 1949 (28 USCA 2072) after this case had been tried.

The affirmative defense of the termination notice served on behalf of the defendant Blackard was introduced without objection by plaintiffs (Page 72, plaintiffs' attorney: "Well, if the court please, I have no objection to the introduction of both exhibits as I have intended to introduce them myself").

The case was tried before a jury as in an action at law; no specific issues were framed. The jury found damages against the defendants Blackard and Starns, but not against the defendant Phillips, even though the latter was by all testimony a partner of Blackard, and active in the conduct of the bar and restaurant business, while Starns was neither a partner nor active in Blackard's business (TR. 332, 334, 661, 662, 663).

By the very terms of the complaint, three of the six specific causes for damages occurred after the time of service of the termination notice on April 15, 1948.

SPECIFICATIONS OF ERROR.

1. The Court erred in refusing defendants' requested instruction No. 1 as follows:

> "You are instructed that under any version of the purported agreement between Joseph Blackard and Vern Humphries and Kenneth Havens (Plaintiffs' Exhibits 1, 2, and 3), Blackard was entitled to terminate the relationship with

Humphries upon service of a written notice 24 hours in advance of such termination. The contract does not require that grounds for the termination be set forth in such notice. If you find, therefore, that the actions described in paragraphs XI, XII, XIII, XIV, XVI occurred after the 16th of April, then you must find for the defendants even if such actions did occur."

The instruction was handed to the Court (TR. 844) when plaintiffs announced that there would be no rebuttal testimony. Defendants again requested such an instruction and the Court allowed an exception (TR. 859).

"The Court. I will consider the proposed instructions and if I think justice would be denied by failure to give the instruction, I will give it; however, you can take the exception."

Defendants argued (TR. 860):

"so I would like an instruction to the effect that that was a matter of proper agreement between the proper parties that the undisputed testimony is that that notice was served and that the plaintiffs after the 24 hours had expired were trespassers on the premises and that in order to entitle the plaintiffs to damages for any of these alleged wrongdoings the jury must find that they occurred after April 16th.

The Court. After what?

Mr. Cottis. Prior to April 16th."

(TR. 861):

"The Court. All of the exceptions will be noted as of course."

2. The Court erred in refusing defendants' requested instruction No. 2.

This instruction was as follows:

> "You are instructed that the plaintiffs were trespassers upon the Panhandle premises after some hour on the 16th day of April, 1948, and that they are therefore not entitled to recover any damages for actions by the defendants which occurred on the premises after that date."

The instruction was requested and an exception allowed at the same time as Instruction No. 1, supra.

3. The Court erred in refusing defendants' requested Instruction No. 3.

The instruction was:

> "You are instructed that the plaintiffs have not produced sufficient evidence to justify you in arriving at any verdict against the defendant Laurence Starns."

The instruction was requested and an exception allowed at the same time as Instruction No. 1, supra.

4. The Court erred in refusing defendants' requested Instruction No. 7.

The instruction was:

> "You are instructed that by all the testimony the plaintiffs failed to perform the obligations required to be performed by them under the agreement of February 4, 1948, and that plaintiffs therefore are entitled to no damages even if the defendants failed to abide by said contract."

The instruction was requested and an exception allowed at the same time as Instruction No. 1, supra.

5. The Court erred in refusing defendants' requested Instruction No. 8.

The instruction was:

> "You are instructed that the amended complaint in this action does not ask any damages for loss of equipment or inventories of consumable supplies belonging to plaintiffs and that the plaintiffs are therefore not entitled to recover for such items."

The instruction was requested and an exception allowed at the same time as Instruction No. 1, supra.

These arguments had been brought to the attention of the Court in connection with a motion for judgment for the defendants. Counsel for the defendants stated in part:

> "And either version of the contract has in it a provision that Blackard can terminate the contract by written notice delivered 24 hours in advance of the effective date of termination. Now there is no denial by the plaintiff and there is no dispute that such a notice was delivered.
>
> The issues that are clouding the matter for the jury right now is whether that termination notice was just, whether there were actual defaults on the part of the plaintiffs and whether Blackard was right in trying to terminate it for the—for grounds set out there. But I submit, Your Honor, that from the nature of the agreement Blackard had the right to terminate it and if he was wrong

in serving a termination notice the plaintiffs' proper remedy is an action for breach of contract and for damages, for failing to deliver the termination notice under the circumstances outlined in the contract, but breaching his contract by delivering the termination notice under other circumstances."

And at page 575:

"There has been no allegation that the equipment was not returned to the Plaintiffs as is provided by Plaintiffs' Exhibits 2 and 3 and under Plaintiffs' Exhibit 1 the equipment would not have to be returned to the plaintiffs.

But even if there were such proof and even if the complaint said that they had failed to return the equipment, which it doesn't, even then the proper action would be for breach of contract that Blackard had failed to comply with the terms of the contracts and had failed to return the equipment, so even then the complaint should be dismissed."

And at page 576:

"Now, the next matter in here that the plaintiffs complain about is that on the 20th day of April, 1948, defendants took possession of plaintiffs' storeroom, a part of said leased premises, and have failed and refused to permit plaintiffs the use thereof. Now, what of it, Your Honor? If they admit, as all the evidence shows, that this termination notice was served on April 15th and that it purported to terminate the agreement on 24 hours' notice, and, if, as I say, their only

remedy is not to ignore the termination notice but to sue Blackard for breach of contract for serving a termination notice when he wasn't justified in serving it. So it makes no difference what happened on the 20th day of April, 1948."

And on page 578:

"That is the same issue as the other one, as long as it was undisputed here that the notice was served on April 15th it can't make any difference what happened on May 5th except in a damage suit for breach of contract and that is the sum total of the allegations in the complaint except for the damages asked and the injunctions asked, and I therefore ask the Court in the alternative either instruct the jury as to their verdict or dismiss the complaint for lack of evidence."

6. The Court erred in denying the motions made by defendants at the close of plaintiffs' case.

Defendants' counsel asked "that the Court in the alternative either instruct the jury as to their verdict or dismiss the complaint for lack of evidence" (Page 578).

At page 580:

"The Court. The motions are denied and the jury will be recalled."

At page 580:

"Mr. Cottis. I want to make two motions and the argument will be identical. I ask that the complaint be dismissed as to the defendant, Glen Phillips, because no testimony has been adduced

showing Phillips' liability and as a second motion I ask that the complaint be dismissed as to Larry Starns because nothing implicates Mr. Starns in this.

The Court. As to Starns there is enough evidence, in my judgment, to go to the jury. I am not certain as to Phillips, but that motion too will be denied at this time. Counsel may renew it at the close of the entire case."

7. The Court erred in not rejecting the verdict of the jury as to the defendant Starns.

Two days after the verdict was returned, the appellant moved the Court in part, as follows (TR. 13):

"1. That the verdict of the jury herein rendered on the 6th day of July, 1949, be rejected in its entirety for the reason that it is not supported by a preponderance of the evidence and was an advisory verdict only.

2. That the said verdict be rejected as to the defendant Laurence Starns for the reason that as to the said defendant such verdict is contrary to the weight of the evidence.

3. * * *

4. * * *

5. That the said verdict be rejected for the reason that the undisputed evidence showed a termination of the plaintiff's right of occupancy of the premises on 16 April, 1948, and the complaint alleges no wrong-doing prior to that date.

6. That the said verdict be rejected upon the ground that this court in determining the validity

of a temporary restraining order in this cause of necessity determined the issue of right to occupancy of the premises, and the said verdict is contrary to such determination."

The motion was denied through the rendition of judgment on November 4, 1949 (TR. 24).

8. The Court erred in refusing to make findings of fact and conclusions of law.

Appellant moved the Court (TR. 25):

"that counsel for both the plaintiffs and the defendants be required to submit proposed findings of fact, and the Court enter such findings as it may deem appropriate."

The Court denied the motion (TR. 26):

"Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises, denied motion."

9. The Court apparently erred in permitting written instructions to go to the jury room with the following portion stricken (TR. 20):

"The defendants, Blackard, and Starns, in their his testimony have has denied the assertions of the plaintiff, Humphries, as regards the final written agreement and the oral modifications thereof."

Neither the Court nor counsel was aware that the instruction might have gone to the jury room in this form until the transcript was printed, at which time, through inadvertence, selected instructions from those

in the Court's file were included in the record. No exception was taken by appellant to the form of the instructions as given, and the instructions as read to the jury (TR. 850) did not include the stricken part.

Because of the fact that the jury apparently considered the written instructions with the stricken portion included, appellant submits that a jury may have drawn the inference that Blackard and Starns admitted the alleged oral modifications of the contract.

10. The amount of damages is not justified.

11. Punitive damages should not have been included.

The verdict of the jury included $2,500.00 as punitive damages (TR. 12).

12. Testimony was improperly admitted over the objections of the appellant, exemplified by the following:

(a) Testimony regarding insurance coverage (TR. 793, 795, 797, 799).

(b) Testimony regarding a conviction for the illegal possession of moose meat (TR. 189-191, 340-348, 542-554).

(c) Introduction of irrelevant exhibits, such as a lease (TR. 450), a credit memo (TR. 486), a complaint in another action (TR. 126).

(d) Testimony concerning cost of equipment (TR. 136-144).

(e) Testimony tending to link appellant's name with notorious gamblers (TR. 819-822).

(f) Testimony attempting to show an illegal arrangement between defendants Blackard and Starns (TR. 789).

(g) Testimony regarding five additional seats at appellees' restaurant counter (TR. 151-152, 158, 485).

13. The Court erred in allowing mileage for plaintiffs as witnesses in the amount of $255.00 apiece.

ARGUMENT.

Argument is in the same order as the specifications of error and the numbering is identical.

SECTION 1. REFUSAL TO INSTRUCT AS TO THE SIGNIFICANCE OF THE TERMINATION NOTICE.

Exhibit A, attached to the complaint, is a contract between the plaintiff Humphries and the defendant Blackard. During the trial, this contract was introduced as Plaintiffs' Exhibit 1 (TR. 84) and over objections a second version was received as Plaintiffs' Exhibit 2 (TR. 119). The contract was again introduced over objection as Exhibit No. 3 (TR. 123). The original exhibits have been withdrawn from the clerk's office at Anchorage and are in San Francisco; it is apparent from them that only Exhibit 1 was signed. The distinctions between the version of the

contract introduced as Exhibit 1, and that version introduced as Exhibits 2 and 3 are these:

(a) Exhibit 1 states (TR. 85):

"The parties understand that the present restaurant equipment is to be moved to a new location South of its present site."

Exhibit 2 states (TR. 125):

"The parties understand that the present restaurant equipment is to be moved to a new location approximately 18' South of its present site."

(b) Exhibit 1 states (TR. 85):

"At the termination of this agreement Humphries agrees to surrender the premises peacefully and forthwith and an equipment inventory of equal or better quality than present inventory."

Exhibit 2 states (TR. 125):

"At the termination of this agreement Humphries agrees to surrender the premises peacefully and forthwith and an equipment inventory of equal or better quality than present inventory and allowed to move or sell additional equipment when agreement terminated."

Both versions, however, are identical with respect to the following provision (TR. 86 and TR. 125):

"In event Humphries defaults in the terms of this agreement Blackard may terminate this one year agreement upon 24 hours notice."

The evidence is clear that a termination notice was served on April 15, 1948 by Blackard. The deputy

marshal testified that the return was made by him (TR. 71):

"Q. (by Mr. Cottis). Mr. Hoff, I am going to show you what purports to be a notice dated April 15th and which has been marked Defendant's Exhibit 'A' for identification and which contains on the reverse side a statement dated March 10th (sic) bearing what purports to be your signature. I ask you whether that is your signature?

A. Yes, this is my signature."

The service and the notice were further substantiated by the plaintiff Humphries (TR. 160 and TR. 161):

"Q. (by Mr. McCutcheon). Did Blackard ever attempt to terminate your lease, Mr. Humphries?

A. Yes, he did by Deputy Marshal serving the paper.

Q. Referring to Defendant's Exhibit 'A', is that the paper you received?

A. Yes, it is.

Q. And on what date did you receive that paper?

A. I believe that it was on the 15th day of April.

Q. It is dated April 15, 1948, addressed to:

'Vernon Humphries,
Kenneth Havins and
Alaska Food Service,
Anchorage, Alaska.

Dear Sirs:

Please take notice that the agreement executed by us on 4 February, 1948, is hereby

terminated, such termination to be effective twenty-four (24) hours from the hour of receipt of this notice by you.
The defaults upon which this termination is based are:

(1) You have failed to provide the bond required by the contract.

(2) You have failed to pay me the amounts stipulated in the contract for your concession.

(3) You have failed to comply with the law, in that you illegally had moose meat upon the premises.

(4) You have failed to pay the expenses incurred by you.

Sincerely,
By /s/ Joe Blackard.' "

Had the trial (and the pleadings) been orderly, a defense to the complaint would have been the above notice and its service on April 15th. The attitude of the plaintiffs apparently was that Blackard was not justified in terminating the contract: thus, they tried to establish a waiver of the bond provision of the contract, an offset for the concession charges stipulated in the contract, a "frame-up" in connection with the moose meat conviction. So, the fact of the notice and its service came before the Court upon plaintiffs' direct case (TR. 72), and what should have been rebuttal to an affirmative defense also was introduced as part of the direct case. This confusion in presentation made it more than ever urgent that the jury be instructed clearly upon the legal effect of the termination notice.

SECTION 2. REFUSAL TO INSTRUCT THE JURY THAT PLAINTIFFS WERE TRESPASSERS FROM AND AFTER APRIL 16, 1948.

The same arguments apply in connection with this instruction as those set forth in Section 1, supra.

SECTION 3. REFUSAL TO INSTRUCT THE JURY REGARDING EVIDENCE AGAINST THE APPELLANT STARNS.

PART A. The complaint alleges that on April 20, 1948 defendants took possession of plaintiffs' storeroom. A portion of the evidence in this connection was (TR 178) (Testimony of Mr. Humphries):

"Q. And did you have another storeroom, did you say?

A. Yes, I did.

Q. And where was that storeroom located?

A. It was upstairs in back of the restaurant.

Q. And what did you do in connection with the storeroom?

A. I placed the padlock on it.

Q. And what date was that?

A. That was on the 21st day of May.

Q. And what was the value of the inventory contained in that storeroom?

A. Around $2,000. I called the United States Marshal down and asked his advice upon the padlock of the doors until we had this straightened out.

Q. And did Mr. Blackard offer to purchase those supplies?

A. No, he refused to buy them and refused to let me sell."

Another portion was (TR. 229-230):

"Q. Now, what door was it that you say Joe locked?

A. That was the doors that Joe locked.

Q. That is the door into the entrance way to the basement?

A. We always had it locked. We always had a lock on there and we both had keys but Mr. Blackard taken and got another lock and put on there so that my key was no longer any good.

Q. And what date was that that you testified?

A. That was, I would say that was somewhere around the 15th of April.

Q. It was before that notice was served on you terminating the contract?

A. It was the same day.

Q. The same day?

A. Yes."

(TR. 162):

"A. Because Blackard had placed a padlock and refused me entrance into the storeroom.

Q. When was that?

A. That was somewhere around the 14th of April. It was about a day before the notices was served on me.

Q. And what did you say he did?

A. He placed a padlock upon the door of the storeroom and permitted us to enter."

Nothing anywhere in the record shows any involvement on the part of Starns either before or after the 15th of April in connection with any storerooms used by plaintiffs.

PART B. The complaint alleges that defendants neglected to provide light, heat and water in accordance with the agreement.

Testimony of Mr. Humphries (TR. 180):

"Q. Now, did Mr. Blackard pay for the heat?
A. No, sir."

Testimony (TR. 182):

"The Witness. Joe Blackard and myself present and we was discussing heat. I was going to rent it out for $250 a month——"

Testimony (TR. 182):

"Mr. Blackard agreed to take and pay of the lights, space and so forth in there, to furnish that upon this 6%."

Testimony (TR. 185, 186):

"Q. (by Mr. McCutcheon). Did you ever have a discussion with Mr. Blackard with reference to the payment of the lights?
A. Yes.
Q. And when and where and in whose presence?
A. The first I knew he wasn't going to pay for them was when our lights were turned off at 12 o'clock. Mr. Blackard had them turned off and I rushed down to see what was the matter at the City Lights and they said 'You have never paid your light bill'. I ran back and got the contract and they called Joe Blackard up on the 'phone. 'Here under your agreement you are supposed to have the deposit up here' and Joe Blackard agreed that he would come back later

and settle it so they wouldn't turn the lights on. So I made the deposit."

Again, if there was any wrong done, the appellant Starns was not involved.

PART C. The complaint alleges that defendants conducted gambling games near the restaurant counter which interfered with their business.

Testimony of Mr. Humphries (TR. 166):

"Q. Were card games conducted?
A. Yes, they were.
Q. For money?
A. For money.
Q. Who owned the card games?
A. Joe Blackard.
Q. Do you know that?
A. I am positive.
Q. Did someone run the card games for him?
A. Yes.
Q. Who ran the card games for him?

Mr. Cottis. Your Honor, I object unless the witness explains how this knowledge came to him.

The Court. Overruled. You may answer.

Q. (By Mr. McCutcheon). Who ran the games for Mr. Blackard?

A. There was three different parties run it, one was commonly known here in town as Red That Runs Card Games, and Mr. Preston, that was two that I know and Barney—I can't recall Barney's last name right now but he is a very well known professional.

Q. Do you know they ran the card games for Mr. Blackard?

A. Knock poker."

Again, there is no connection with the appellant Starns.

PART D. The complaint alleges that defendants impaired plaintiffs' credit rating.

Testimony of Vern Humphries (TR. 176, 177):

"Q. What kind of a credit rating did you have when you opened the business?

A. I could go anywhere in town and buy anything I wanted.

Q. What kind of a credit rating did you have when you closed your business?

A. I couldn't borrow a penny.

Q. Do you know why your credit rating suffered?

A. Yes, I do.

Q. Why did it suffer?

A. It suffered because Joe Blackard maliciously called up different people around and said he was throwing me out, that I didn't have anything and that he was foreclosing."

and testimony of Marvin Campbell (TR. 474-475):

"Q. When did you close the business down?

A. Somewhere around the 22nd of May.

Q. And why did you close it down?

A. Feelings just got too hot and business just disintegrated so that we just decided to just close it down.

Q. Now, what difficulties did you encounter?

A. We had lots. Feelings were just running too high.

Q. Feelings between whom?

A. Between Blackard and Phillips and myself and Mr. Humphries.

Q. What, if anything, did Mr. Blackard do that affected your business?

A. Well, he tried to ruin the credit rating.

Q. How did he do that?''

PART E. The complaint alleges that on May 5th the defendants maliciously prohibited the delivery of fuel oil.

No evidence appears in the direct case concerning this allegation. However, as part of the defendants' case, Mr. Heverling, one of the owners of the fuel company stated (TR. 647):

''and May 7th, which was the last, I delivered 234.''

Same witness (TR. 647):

''Q. Mr. Heverling, in the plaintiff's complaint in this action that is being tried is the following allegation 'That on or about the 5th day of May, 1948 defendants [meaning Blackard, Phillips and Larry Starns] did with deliberate intent to injure plaintiff [meaning Vernon Humphries and Marvin Campbell] maliciously, wilfully and wantonly prohibit the delivery of fuel oil to plaintiff, all to plaintiff's damage.' Did any of those defendants ever prohibit the delivery of fuel oil to Humphries or Campbell?

A. No, sir.''

PART F. The complaint alleges that defendants on May 5 took possession of the restaurant, locked the premises, and announced to plaintiff's customers that the premises were permanently closed.

Testimony of Marvin Campbell (TR. 476):

"Q. (by Mr. McCutcheon). Did Mr. Blackard at any time lock the front door?

A. Yes.

Mr. Cottis. Object to it as leading.

The Court. Overruled.

The Witness. He did, yes.

Q. (by Mr. McCutcheon). When?

A. On several occasions."

Testimony of Vern Humphries (TR. 162):

"Q. Did he do anything else?

A. Yes, he changed the lock on the front door. He closed the place down at one o'clock, which we were operating 24 hours a day, put the stools on the counter, turned the stoves out and told customers that he had closed me out of business —I was no longer there.

Q. And on what date was this?

A. That was on the 15th day—night of the 15th of April, the same day he served the paper on me.

Q. And what did you do then?

A. I wasn't there at the time he locked the whole place up and I was called out about one o'clock at night from my home and I came down and consulted with the policeman and I asked Joe first to let me in and he yelled through the door I couldn't get in and I went to the police and they said the best thing I could do was consult an attorney the next morning, and which I did."

Testimony of Vern Humphries (TR. 174):

"Q. Now, how long did you operate your business 24 hours a day?

A. Until the 15th of April.

Q. And that is when Mr. Blackard changed the locks on the front door, did he?

A. Yes, he changed—Mr. Campbell—Mrs. Campbell served eviction papers for them to move and likewise they served papers on me to move.

Q. Did you have a key to the other lock?

A. Yes I did.

Q. Who gave you that key?

A. Joe Blackard.

Q. Did you have an agreement with reference to the key?

A. Yes.

Q. And when did you have that agreement?

A. As I taken and bought the equipment in there and started in I had a key from them on until after noon of the 15th of April and he called the locksmith up and changed the locks on the doors."

As appears from the entire record, counsel for plaintiffs frequently attempted subtly to lead the plaintiffs in their testimony to include the name of the appellant Starns, although, when they were not being led, the plaintiffs generally mentioned either the defendant Blackard or the defendant Phillips, but not Starns. After the above testimony, plaintiffs' attorney inquired, apparently innocuously, of Humphries (TR. 175):

"Q. Who determined what hours you could operate your business?

A. Mr. Blackard and Mr. Starns.

Q. And when they closed the bar you closed the restaurant, is that correct?

A. Yes."

Appellant submits that such questions operated as a reminder that Starns should be included.

No witnesses other than the plaintiffs themselves gave any indication that Starns was involved in the operation of the bar, and many witnesses affirmatively indicated that Starns had no connection with either Blackard or Phillips other than as a creditor of Blackard's. Thus, the deputy marshal (TR. 71):

"Q. Was Mr. Starns present?

A. Not that I remember."

The witness Dorothy Cavin (TR. 443):

"Q. And when you negotiated that arrangement with them did Mr. Starns have anything to do with it?

A. I never knew that Larry Starns ever had anything to do with that because he never used to come in that I ever saw him."

The construction foreman, Earnest Schroeder (TR. 618):

"Q. When Mr. Blackard engaged your company to do work on the bar, was Mr. Starns also in consultation with you?

A. No, not with me.

Q. Your only agreement was with Blackard, then?

A. Blackard, yes."

and the same witness (TR. 619):

"Q. Did Starns ever confer with you with respect to any of these details?

A. No."

Harold Bliss, the owner of the construction company (TR. 650):

"A. Yes, we done some work there for Joe Blackard on his back bar and remodeling the front of the building.

Q. Did you do any work for Larry Starns?

A. No."

The witness William G. Spradlin (TR. 701):

"Q. Do you remember whether Mr. Phillips was there?

A. Yes, he was, he was tending.

Q. Did you ever see Mr. Starns on the premises?

A. No, sir.

Q. Did you ever have any dealings with Mr. Starns in connection with the Panhandle?

A. No, sir."

The defendant Joe Blackard (TR. 748, 749):

"Q. Well, were you and Starns partners?

A. No.

Q. Did you have any interest in the liquor store?

A. None whatsoever.

Q. Was the liquor store connected in any way with the Panhandle premises physically? I mean were there any doors or anything like that?

A. No, there was a door led to the liquor store from the outside and one led into the Panhandle from the street.

Q. Did Starns have any interest in the Panhandle Bar or restaurant business?

A. No, only interest he would have had would have been in case I defaulted on my lease he had a note saying that I had to pay him $4,000 by the first of the year, '48 and $6,000 by the first of the year of '50.

Q. Was that the total of your obligations as to Starns?

A. That is right, I bought a little stock from him that we used and had to pay back, too."

On the other hand, these was no doubt that the defendant Glen Phillips was a partner of Blackard at the time in question. Mr. Blackard testified (TR. 763):

"Q. What, if any, was Glen Phillips' position at the time?

A. Well, when we first opened up Glen worked as a bartender for a couple of weeks, maybe a month and he came in as a partner in the Panhandle."

And on cross-examination (TR. 804):

"Q. Mr. Blackard, in whose name was the liquor dispensing license issued?

A. It was mine and then when Glen Phillips it went in the combined, they put it in my name and Glen's name. When Mr. Tibbitt and Mr. Hardy transferred the license to my name and then a couple of months later it was transferred over to Mr. Phillip's name and mine."

Plaintiffs' Exhibit 22, a sheaf of invoices, were marked "Blackard and Starns" (TR. 671). The orig-

inals of these invoices, defendants' Exhibit "L" did not bear such a notation, excepting for two of the items. Defendants' Exhibit "L" was produced from the office of the construction company, but the reposing place of Plaintiffs' Exhibit 22 pending the trial was apparently with plaintiffs or their counsel (TR. 665).

The notation on the two items of Exhibit "L" is explained by the construction company's bookkeeper, Frances Clay (TR. 776-777):

> "Q. (by Mr. Cottis). Mrs. Clay, I invite your attention to the last two items of Defendants' Exhibit L which bear printed numbers 6302 and 6374 and dated March 23, 1948, and March 8, 1948, and particularly I invite your attention to the words 'Blackwell and Starns' on the first of those and 'Blackard and Starns' on the second of those, can you explain to the Court, if you know, the reason for that change in the billing at that time?
>
> A. We did not know at the first of this work that Mr. Blackard wanted his bills separated this way so that he would know how he would pay for them or put them in his books.
>
> Q. Did you ever have any conversation with Starns about the matter that you recall?
>
> A. No, I did not.
>
> Q. Then is it your testimony that Blackard requests that the bills be made out that way?
>
> A. Yes."

The original of plaintiffs' Exhibit 22 and the original of defendants' Exhibit L have been transmitted to

the Court of Appeals. These are the only evidence, other than unresponsive testimony or testimony which was led chiefly from the plaintiff Humphries, which linked Starns with Blackard in any respect other than as a creditor.

SECTION 4. REFUSAL TO INSTRUCT THE JURY THAT THE PLAINTIFFS HAD FAILED TO PERFORM THEIR OBLIGATIONS UNDER THE CONTRACT.

The contract provided, in all versions (TR. 9):

"Humphries agrees to comply with all laws and in event a grading system is adopted for restaurants by the City of Anchorage, Humphries agrees to endeavor to obtain the highest possible grading thereunder."

The City Sanitation Officer testified (TR. 682, 683):

"Q. Did the city have a grading system for restaurants at the time you were Sanitation Officer in April and May of 1948?

A. Yes.

Q. Could you tell us briefly what that grading system was?

A. Well, it was the grading system that is recommended by the United States Public Health Service grading restaurants, either Grade A or Grade B or Grade C.

Those in a Grade A classification were those that came up to all of the standards of the grading code.

Those in Grade B came up to all the standards with the exception of a few minor violations and Grade C just about anything went.

Q. Now, was Mr. Humphries' restaurant graded?

A. No, I went—called, or I am not sure whether or not called on Mr. Blackard, but someone from the Panhandle called and wanted the Panhandle Bar inspected to be graded and it never was—it never came up to any of the standards. In putting out these when I was grading them I thought it would be probably fair to the operators of these eating and drinking establishments before I put out any grade cards I first inspected them to give them an opportunity to come up to the Grade A standards before putting a Grade B or Grade C card in their restaurant or bar, whichever it happened to be, and the Panhandle Bar was never graded. That is, it was never given a grade card.

Q. Was that the bar or the restaurant?

A. That was the restaurant."

The contract in all versions provided:

"Humphries agrees to conduct a clean sanitary restaurant in the premises known as the Panhandle Bar and Cafe, 314 Fourth Ave., Anchorage, Alaska."

The same witness (TR. 676):

"Q. Will you describe what conditions you found?

A. Well, when they opened it it was in a pretty fair condition, that is, from a sanitary standpoint, and the longer it opened it run down quite fast, that is, and the condition of the premises got progressively worse."

The same witness (TR. 677, 678, 679):

"Q. (by Mr. Cottis). Did there ever come a time when you had to condemn anything on the premises?

A. Yes.

* * * * * * *

The Witness. Yes. Yes, I did, one night I did after Mr. Blackard evidently was having some trouble and he was quite concerned about the fact that the restaurant part be kept in a good, sanitary condition because he was operating the bar just adjacent to it. And he called me one evening about 8:30, as I remember, and asked me if I would come down and check over the restaurant part of the Panhandle and I went down and at that time I found quite a number of food particles that were in very bad condition.

There was liver there—three or four pounds of liver—that had micrococci the size of a dollar and larger that were green-yellow. Now whether Mr. Humphries was using that to feed or was serving that or not I don't know, but if he wasn't he had no right to have it in an establishment like that.

Also there were some calves brains that had stood around without proper refrigeration in storage that had liquefied. They were no longer solid. They were in a gelatinous state. Those were the two things that impressed me most—that was the liver and the brains.

Then at that time the premises in general were in a very poor condition, that is, from a sanitary standpoint it was, things weren't clean at all—refrigerators were dirty, looked as though they hadn't been cleaned in two or three days. The shelves were the same.

> Flour bin had mouse droppings in it as did the sugar containers, and in general it was in very poor shape. And at that time because of the condition and because of the previous warnings that I had given Mr. Humphries, I closed the place and I took the foodstuffs that I had condemned or taken out of there—the brains and the liver —I took them out to the City Dump and burned them. I went right out and saw to it that they were destroyed and not used for any other purpose."

The judgment of conviction for illegal possession of moose meat was introduced as defendant's Exhibit M (TR. 834, 835, 836, 837) and clearly showed another violation of the contract by the plaintiffs. This judgment was attacked on the trial through testimony on plaintiffs' direct case (TR. 189-191, 340-348), where, if the trial had been in accordance with proper procedure, the judgment would have been immune from attack.

The other defaults specified in the termination notice (defendants' Exhibit A) were somewhat disputed by the plaintiff Humphries in his testimony; and although appellant believes that the great weight of the evidence substantiated these defaults, he does not rely upon them in support of this section of his brief.

SECTION 5. REFUSAL TO INSTRUCT THE JURY CONCERNING DAMAGES FOR LOSS OF EQUIPMENT OR INVENTORIES.

Much testimony was admitted concerning the alleged cost of equipment to the plaintiffs (TR. 137-152).

This line of testimony began when plaintiffs offered their Exhibit 4 (TR. 136), a bill of sale in connection with the restaurant.

> "Mr. Cottis. Your Honor, I have no objection to the offering on grounds of authenticity. I object to it on the grounds of relevancy. The document doesn't show where these items were located. There is nothing connected with the matters at issue in this lawsuit.
>
> The Court. Objection will be overruled at this time and it may be admitted marked Plaintiffs' Exhibit 4. It may be read to the jury."

Further objection was made (TR. 140, 141):

> "Mr. Cottis. Your Honor, I object to this line of questioning on the grounds that it is irrelevant to any matters stated in the complaint unless the purpose of it is to show the capital investment of Mr. Humphries in this business.
>
> The Court. Well, I presume it will be connected up by—it is merely preliminary, as I understand, as I understand, at this moment it isn't relevant, but I assume that counsel isn't just putting it in trivially.
>
> Mr. Cottis. Very well.
>
> The Court. Objection at this time will be overruled and, of course, if it isn't connected up the Court will entertain a motion to strike and have the jury disregard it."

An objection was made to Exhibit 5, a release from a former partner of the plaintiff Humphries (TR. 145):

> "Mr. Cottis. I have no objection to the authenticity, Your Honor, I object to it on the grounds of irrelevancy, Your Honor.
>
> The Court. Objection is overruled and it may be admitted and marked Plaintiff's Exhibit 5 and may be read to the jury."

Defendants brought the matter up again (TR. 153):

> "Mr. Cottis. Your Honor, I understand that all this is subject to my later motion to strike for reasons that it wasn't connected up in any way with the Complaint.
>
> The Court. It may be so considered."

Obviously, the jury must have taken into consideration the alleged values of some of the equipment to arrive at its verdict, since no damages shown in any other respect could conceivably have brought about such a verdict. This will appear from Section 10, infra.

SECTION 6. COURT SHOULD HAVE DISMISSED ACTION AS TO STARNS AT CLOSE OF PLAINTIFFS' CASE.

The only testimony purporting to involve Starns in any manner—in fact, the only testimony mentioning Starns by name—in plaintiffs' direct case appears at the following pages of the transcript: 71, 81, 86, 94, 98, 102, 103, 106, 108, 111, 117, 120, 121, 147, 149, 150, 151, 152, 154, 155, 156, 159, 163, 175, 196, 208,

209, 216, 221, 223, 271, 272, 273, 292, 299, 310, 314, 315, 316, 317, 334, 338, 339, 359, 384, 403, 440, 443, 458, 459, 460, and 489.

All testimony attempting to link Starns with Blackard or Phillips in any respect other than as a creditor was that given by the plaintiff Humphries; some significance may attach to the fact that Humphries mentioned Starns less and less in his testimony as Humphries became more tired.

SECTION 7. REJECTION OF APPELLANT'S MOTION TO REJECT THE VERDICT.

The matters concerned in the motion duplicate Specifications of Error herein and the arguments are identical.

SECTION 8. REFUSAL TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The case had been treated from the beginning as an equitable proceeding. A temporary restraining order had been granted in May of 1948 and after hearing had been vacated. In February of 1949, the defendants having been declared in default, hearing was held on a motion to set the matter for trial. The proceedings before the Court (number 14 in Appellant's Designation of Record, TR. 872) do not appear in the printed record but a transcript is in the file. The proceedings include the following:

"Mr. Nesbett (for the plaintiffs). No, your honor, jury is not compulsory under the wording of the section as I read it. I have the section in court marked if your honor cares to read it.

The Court. Well, does either party demand a jury concerning the damages. I realize the court may not be compelled to grant it, but I have made it a uniform rule here to grant a jury trial in every case where either of counsel asked for an advisory jury.

Mr. Cottis. The defendant does request an advisory jury, your honor. * * *"

All matters alleged in the complaint as a basis for damages, excepting perhaps the alleged impairment of credit, are wholly dependent upon the issue of whether the plaintiffs had a right to possession of the premises. The cause falls within that category of equity jurisdiction described in 19 *Am. Jur.* at page 141 as "The court has inherent jurisdiction to prevent threatened disturbance of one who is in the peaceful use and enjoyment of real estate."

Equity will retain jurisdiction of the cause despite the destruction of the building on the premises.

"The Court is not ousted of jurisdiction by reason of a change of circumstances which has made impossible the granting of equitable relief. * * * Again, where the only reason for not granting an injunction is that pending the suit the complainant's lease expired, the complainant will not be turned out of court, but the bill will be retained for the assessment of damages." (19 *Am. Jur.* p. 126.)

"Having taken cognizance of a cause for any purpose, a court of equity will ordinarily retain jurisdiction for all purposes; decide all issues which are involved by the subject matter of the dispute between the litigants; award relief which is complete and finally disposes of the litigation." (19 *Am. Jur.* pp. 126, 127.)

"A part of the controversy should not be remitted to a court of law." (19 *Am. Jur.* p. 128.)

In *Smith v. New England Aircraft Company* (69 A.L.R., p. 314), the Appellate Court in its opinion stated:

"Whether the case should have been retained for assessment of damages rested in the sound discretion of the trial judge. That was exercised against the plaintiffs and presents no error of law."

That the District Judge in the instant case considered the matter appears from the striking of the words "at law" from the instructions (TR. 18).

Since the cause remained in equity, the verdict of the jury was entirely advisory and the Court should have made findings of fact.

"'There is no process by which the chancellor can substitute the conscience or belief of a jury for his; and he must find the facts on his own responsibility.' Dunn v. Dunn (1862) 11 Mich. 284. Under a constitution recognizing chancery jurisdiction, a statute giving a party in equitable causes a right to a jury trial with the same effect as in common-law actions is unconstitutional; the chancellor must ultimately decide the case on

the evidence. Brown v. Buck (Brown v. Circuit Judge) (1889) 75 Mich. 274, 42 N.W. 827, 5 L.R.A. 226, 13 Am. St. Rep. 438." (156 A.L.R. 1172).

"The first and elementary principle in dealing with advisory verdicts in equity is that no decree or judgment should be rendered directly upon the verdict itself, as in an action at law After a final hearing on all questions of fact, including a hearing on the weight to be given to the jury's conclusions, the court should make its own findings of fact as a basis for the decree or judgment." (156 A.L.R. 1171).

"In this connection, however, it is essential, in any jurisdiction, that the statutes and rules of court be consulted as to the need of presenting definite requests for special findings by the court, for in the absence of such requests the requirement as to such findings may be deemed to have been waived, and a general finding be deemed sufficient. E.g., Pence v. Garrison (1884) 93 Ind. 345; Chicago, I. & L. R. Co. v. Myers (1914) 57 Ind. App. 458, 105 N.E. 445, 107 N.E. 296.

The proper practice in a court having consolidated jurisdiction and procedure, sitting with a jury, is thus described in Stahl v. Gotzenberger (1878) 45 Wis. 121: 'In all equitable actions the the case must be tried by the court, and, before judgment can be entered, the court must find that all the facts necessary to entitle the plaintiff to a judgment have been established by the evidence. * * * When the jury have given their verdict, the case is then to be taken up by the court; and if the court is satisfied with the determination of the jury upon the issues submitted to them, he adopts

their findings as to such issues. If he is not satisfied with the finding of the jury, he may, either upon the application of a party or of his own motion, set aside such verdict and submit such issues to another jury; or, if he is satisfied that no aid will be obtained by such further submission, he may proceed to decide the issues without any further intervention of a jury. After a verdict has been rendered upon the issues submitted to the jury, the court hears the testimony on the other issues, not submitted to the jury, if there be any, and then, upon all the testimony in the case, including that given upon the trial of the issues by the jury, disposes of the whole case, and, by written findings of fact and conclusions of law, decides all the issues, and directs judgment.' In that case the court reversed the judgment because it appeared affirmatively that the court had never passed upon the issues in the action or ordered judgment. A general verdict had been taken as in an action at law, and the clerk had entered judgment, as of course, on the verdict. The above quoted description of the proper practice is insufficient, however, in one respect: The adoption of the jury's findings, if any express adoption or approval is made, will stand as the finding of the court on those issues. If made at all it must be made on the evidence. The proper practice, if any express adoption is made, is to insert it in the judge's final conclusions in his memorandum and order for a decree or judgment." (156 A.L.R. 1172).

The practice required by statute in Alaska appears at 55-8-1 A.C.L.A. 1949.

> "Whenever it becomes necessary or proper to inquire of any fact by the verdict of a jury, the court may direct a statement thereof, and that a jury be formed to inquire of the same. The statement shall be tried as an issue of fact in an action, and the verdict may be read as evidence on the trial of the action."

The matter was considered by the District Court in Alaska in 1907 (*Juneau Water Co. v. Jualpa Co.,* 3 Alaska 382). In that case no findings or conclusions were made after an equity trial with an advisory jury. The court stated (page 387):

> "It therefore becomes a question whether the written opinion of the court filed in the cause is to be taken as the formal findings of fact and conclusions of law required by the Code. A perusal of section 372, p. 226, of the Code of Civil Procedure of Alaska, referring to the findings, etc., in equity causes, and section 209, p. 186, of the Code referring to findings, etc., where the cause is tried by the court without a jury, make it plain that the opinion cannot, in any way one views it, be considered to be findings and conclusions, as required by the Code."

Section 372, cited by the Court, is found at 55-8-1 A.C.L.A. 1949; Section 209 is similar to, but not identical with, 55-8-2 A.C.L.A. 1949.

> "The establishing, by the codes, of a single system of pleading and procedure without distinction between equity and law, has led to many instances in which the court, or both court and counsel, have tacitly followed the usual routine through

trial and judgment, only to have the question later raised whether the case was one of equitable cognizance. Although this is erroneous procedure, the question whether an upper court will reverse the judgment on that ground depends largely on the inclination of the particular court, the degree of estoppel (see infra, VII c 3) applied against counsel who has concurred in the procedure, and the question whether errors in rulings and directions are shown to have been made at the trial. The question is as to the effect of the entry of judgment on the verdict with no record of findings having been made * * *

But the weight of authority is to the effect that where the court has simply ordered judgment on the verdict as in an action at law, the judgment cannot be supported on the theory that the judge has thereby adopted the verdict as his own findings. (Citing cases)" (156 A.L.R. 1195).

"Usually where error has occurred in this respect it has occurred in a court acting under the code system, so-called, in which distinctions in pleading and forms of action have been abolished and the two systems of jurisprudence merged. The number of cases under this system, found in the reports, in which judge and counsel have unsuspectingly followed the regular procedure of jury trials through to judgment, only to find on appeal that the case was technically in equity, is a strong argument for the two-sided court." (156 A.L.R. 1173).

"The court declared that 'the trial was altogether conducted as a trial at common law, and that the decree was rendered on the verdict precisely as a judgment is rendered on a verdict at

common law. This was clearly an error. The case being a chancery case, and being instituted as such, should have been tried as a chancery case by the modes of proceeding known to courts of equity. In those courts the judge or chancellor is responsible for the decree. If he refers any questions of fact to a jury, as he may do by a feigned issue, he is still to be satisfied in his own conscience that the finding is correct, and the decree must be made as a result of his own judgment, aided as is true, by the finding of the jury. Here the judgment is pronounced as a mere conclusion of law on the facts found by the jury." (156 A.L.R. 1175).

SECTION 9. STRIKING A PORTION OF THE TYPEWRITTEN INSTRUCTIONS.

The possible effect upon jury deliberations of the stricken portion of the Court's instruction 1-A (TR. 20) seems obvious, but appellant recognizes that he failed in his own duty to examine the instructions before they were handed to the jury.

SECTION 10. THE AMOUNT OF DAMAGES.

The restaurant business operated by plaintiffs was purchased for $2250.00, according to the testimony of the person who sold it to the plaintiff Humphries (TR. 826, Clyde Graves).

> "A. Vern Humphries and Kenneth Havins they bought the cafe from me; they paid me $2250 for it. They paid me $1150 in a check and $1100 in cash."

According to the plaintiff Humphries, the purchase price was $2500 (TR. 251, 252). In any event, there seems no dispute that 3 months later they could have sold the business for $9000 plus the worth of the inventory on hand (TR. 179, Humphries):

> "I had the business sold for $9000 plus inventory and I brought the man to your office to close the deal and called Mr. Blackard up there and in his presence Mr. Blackard said 'No, there would be no deal.' "

And the plaintiff Campbell testified (TR. 477, 478):

> "Q. And did he make you an offer for the business?
>
> A. Yes.
>
> Q. How much was it?
>
> A. He offered $9000 plus inventory, as I remember it.
>
> Q. And was that sale ever consummated?
>
> A. No, it wasn't.
>
> Q. Why not?
>
> A. Because he stipulated that he wanted to get approval of all parties in this matter.
>
> Q. And did he get approval of all parties?
>
> A. No, he couldn't.
>
> Q. Who didn't he get approval of?
>
> A. Joe Blackard wouldn't approve."

Similar testimony appears at TR. 533, 534.

With respect to possible loss of profits, the testimony indicated that the gross receipts of the business for the 21 days of March that it operated amounted to just under $3100. The plaintiff Humphries (TR. 170): "First 21 days was $3090.85".

During the next month, April of 1948, Humphries testified (TR. 287):

"Q. Do you recall what it was during April?

A. I couldn't be exact but I believe during April the account ran up there, I wouldn't say unless I had the figures to look at.

Q. Do you think it was more than $3000?

A. Yes, I think it were."

During the 21 days of May, Humphries testified (TR. 286):

"Q. Well, your gross receipts of May of 1948 were over $3000?

A. Yes, I have seen it; it is $3000 and some odd—one hundred or two hundred or three hundred, I believe, and some odd dollars, and some cents.

Q. During May?

A. During May."

Since receipts remained stable and since the sale price of plaintiffs' business more than tripled during the period concerned, the jury's finding of $5935 compensatory damages is difficult to justify. Even if the complaint had been amended to allege a cause of action for interference with plaintiffs' sale of the restaurant, the evidence obviously shows no hint of any such interference by the appellant Starns.

SECTION 11. PUNITIVE DAMAGES ARE IMPROPER.

"Exemplary or punitive damages will never be awarded, it seems, the theory being that the complainant, by having applied to a court of equity, must be deemed to have waived all claim to recovery other than compensatory damages." (19 Am. Jur. p. 125).

SECTION 12. EVIDENCE WAS IMPROPERLY ADMITTED.

Testimony was admitted concerning the alleged cost of restaurant equipment, concerning the business which the restaurant might have had if it had had five additional seats, concerning a conviction of the plaintiff Humphries for illegal possession of moose meat at the premises, concerning an eviction action brought by the mother of the plaintiff Campbell, (owner of the premises and landlord of the defendants); none of such testimony was properly before the Court. But appellant especially invites attention to testimony concerning fire insurance coverage and business interruption coverage carried by the defendant Blackard and admitted over repeated objections:

"Q. Do you recall whether or not you had the items insured that you purchased?

A. I didn't——

Mr. Cottis. Objected to as immaterial and no relevancy." (TR. 793).

"The Court. Very well, the objection is overruled, he may answer." (TR. 794).

* * * * * * *

"Mr. Cottis. I object, your Honor, as completely irrelevant. This is obviously a fishing

expedition as to Joe's collectibility in case plaintiffs should——

The Court. Overruled."

(TR. 794).

"Q. How much were you to receive?

Mr. Cottis. I object as irrelevant.

The Court. Overruled."

* * * * * * *

"Mr. Cottis. May it please the Court, there was not a word in direct examination about insurance and this is an improper cross-examination when he gets into that subject and I object to the whole matter of insurance except as it has pertinency as to possible value or purchase price. If that is——

The Court. As far as the restaurant is concerned it is certainly revelant in my judgment."

(TR. 795).

"Q. Well, how much money and insurance did you collect altogether?

Mr. Cottis. I object, your Honor, as completely irrelevant.

The Court. Overruled."

(TR. 797).

"Mr. Cottis. Objection, your Honor, unless it is restricted to the cafe and even then I object because none of it has any bearing on the direct examination."

(TR. 799).

Surely, whether or not Blackard carried insurance could have no bearing upon whether the defendants

had wrongfully taken possession of a storeroom, or neglected to provide light, heat and water, or conducted gambling games, or maliciously impaired plaintiffs' credit, etc. But Blackard's testimony that he carried business-interruption insurance of $37,500 would necessarily influence a jury, which would not understand that the face amount of such a policy is a ceiling and that the amount paid is determined by how long it takes, or should take, to establish a similar business in a similar location. With respect to any fire insurance carried by Blackard on restaurant equipment, appellant submits that from plaintiffs' exhibit I (the contract between Humphries and Blackard) there can be no doubt that Blackard owned some of the restaurant equipment. Since he had a right as owner to insure it, the matter of whether he did, whether he collected on the policy, and how much insurance he had were as irrelevant as whether he carried business-interruption insurance on his bar. The jury, however, could have concluded that Blackard had insured restaurant equipment which belonged to the plaintiffs and that (irrespective of the complaint) they should have a verdict adequate to compensate them for it.

SECTION 13. INCLUSION OF $255 MILEAGE FEES FOR PLAINTIFFS AS PART OF COST.

Plaintiff's second amended cost bill (TR. 39), includes mileage fees for Humphries and Campbell "* * * from the point where said witness entered the

Territory of Alaska, to Anchorage, Alaska, a distance of 850 miles, at 15¢ per mile * * *'' and return. Appellant's attorneys filed objections (TR. 43) on these grounds: (a) that the point of entry was distant from the place of trial only 179 miles, or less; (b) that the cost bill does not disclose at what point the airplane carrying plaintiffs is alleged to have first flown over Territorial waters; (c) that mileage could not be allowed for more than 100 miles because no court endorsement had been made validating service beyond that distance; (d) that as a practical matter, the witnesses were not within reach of a subpoena until their airplane landed.

The Alaska statute provides that a witness is not obliged to attend a trial from more than 100 miles except that ''the court or judge thereof, upon the affidavit of the party, or some one on his behalf, showing that the testimony of the witness is material and his oral examination important and desirable, may indorse upon the subpoena an order for the attendance of the witness; the service of such subpoena and order and the payment of legal fees to the witness are sufficient to require his attendance, if he be served within the Territory''. (58-3-7, A.C.L.A. 1949).

The District Court, in its opinion regarding the cost bill, allowed the requested mileage fees largely in reliance upon the Ninth Circuit decision in *Deal v. United States* (1926; 11 F.2d 3; rev'd on other grounds, 274 U.S. 277, 47 S. Ct. 613, 71 L. Ed. 1045). The court there stated in part (p. 9):

> "It is held that the adverse party is not entitled to complain of the failure to indorse on the subpoena an order requiring the attendance of the witness. If he attends, he is entitled to his mileage and per diem. We think that this construction of the statute is correct, and that defendants' exceptions to the mileage taxed were properly denied."

The only distinctions between the *Deal* case and the case at bar are: (a) in the *Deal* case the witness was subpoenaed; (b) the witness there was not a party; (c) the court did not have occasion to make the additional rulings arising from use of the airplane.

Appellant submits that the rule expressed in the District Court opinion (TR. 28 et seq.) is unsound: every airplane flight to Alaska first arrives over Territorial waters at a different point; a difference in routing would result in a capricious difference in mileage fees—e.g., a flight from Chicago to Anchorage via Seattle would result in a much higher allowance than the same flight from Chicago to Anchorage on the same airline at the same expense to the passenger, but routed via Edmonton and entering Alaska near Northway; likewise, a witness from Tokyo, entering the Territory at Shemya, would receive much more than a witness from Berlin, entering Alaska from the East. Unless a subpoena is endorsed, the opposing party has no means of obtaining a hearing as to the materiality of oral testimony of witnesses who may be entitled to two-way mileage at 15¢ per mile for

thousands of miles, even though their attendance at the trial was coincidental to other business which would have brought them to the place of trial in any event.

CONCLUSION.

Appellant Starns (TR. 814) was asked his relationship with Blackard, and he answered: "I loaned Mr. Blackard a sum of money in order that he could make the deal with Mr. Tibbitt and Mr. Hardy for the bar. And then in return for that he was to—I was to have space for a liquor store in that building."

When appellant was asked his relationship with Humphries or Campbell (TR 814), he replied: "I have never had any dealings with either one of them."

The Starns testimony is corroborated by Blackard and by all witnesses who testified on the subject excepting the plaintiff Humphries, who had been convicted of two crimes (TR. 836 and 841), and whose testimony was inconsistent in several respects. The Starns testimony is not disputed by any exhibit, and is somewhat strengthened (as to his relationship with Blackard) by the wording in the assignment of the lease from Tibbitt to Blackard and Starns (TR. 463): "as tenants in common, and not as joint tenants".

Justice requires that sufficient credence be given the Starns testimony and that enough weight be ac-

corded the errors at the trial to grant the appellant relief from the District Court judgment.

Dated, Anchorage, Alaska,
October 23, 1950.

Respectfully submitted,
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